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Are Franchisors Joint Employers under the NLRA?  
Maryssa Mataras\*

Part I: Introduction

The National Labor Relations Act (“NLRA” or “the Act”)<sup>1</sup> defines the term “employer” to include “any person acting as an agent of an employer, directly or indirectly”.<sup>2</sup> The modern business landscape has evolved to encompass conglomerates, parent corporations, subsidiaries, and franchises, and as a result, “the traditional employer-employee relationship” has become muddled.<sup>3</sup> Various legal doctrines have developed to address the complexity, depth, and multidimensionality of employment issues in the business sector.<sup>4</sup>

The “joint employer” doctrine, although not expressly defined in the NLRA, is a legal principle that expands the notion of “employer.”<sup>5</sup> In essence, the National Labor Relations Board (“NLRB” or “the Board”)<sup>6</sup> or a court may deem legally separate and independent business entities to be the joint employers of an aggrieved employee. This will occur when the two entities “share or co-determine those matters governing the essential terms and conditions of

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<sup>1</sup> 29 U.S.C. §§ 151–69 (2015). The author will use “NLRA” or “the Act” to collectively refer to the National Labor Relations (Wagner) Act of July 5, 1935, Pub. L. No. 74-198, 49 Stat. 449 (1935), the Labor-Management Relations (Taft-Hartley) Act of June 23, 1947, Pub. L. No. 80-101, 61 Stat. 136 (1947), and the Labor-Management Reporting & Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 518 (1959).

<sup>2</sup> 29 U.S.C.A. § 152 (West 2015). The definition excludes the United States, Government-owned corporations, the Federal Reserve Bank, states or political subdivisions, labor organizations, or “anyone acting in the capacity of officer or agent of such labor organization.” *Id.*

<sup>3</sup> *Airborne Express*, 338 N.L.R.B. 597, 599 (2002) (Member Liebman, concurring); *see also* Jeffrey M. Hirsch & Barry T. Hirsch, *The Rise and Fall of Private Sector Unionism: What Next for the NLRA?*, 34 FLA. ST. U. L. REV. 1133, 1140–45 (2007) (identifying modern workplace management techniques and proposing alternatives that result in increased relevance for the NLRA).

<sup>4</sup> *See N.L.R.B. v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1121–24 (3d Cir. 1982) (explaining and distinguishing the “single employer” and the “joint employer” doctrines).

<sup>5</sup> *See Boire v. Greyhound Corp.*, 376 U.S. 473, 475 (1964) (discussing the Supreme Court’s iteration of the joint employer doctrine).

<sup>6</sup> The National Labor Relations Board consists of five members appointed by the President and approved by the Senate. 29 U.S.C.A. § 153 (West 2015). The Board serves to review Administrative Law Judges’ recommendations and findings of facts after a hearing of complaints under the NLRA, and issue decisions. ARCHIBALD COX ET AL., *LABOR LAW CASES AND MATERIALS* 68 (15th ed. 2011).

employment”<sup>7</sup> and have “historically chosen to handle jointly . . . important aspects of their employer-employee relationship.”<sup>8</sup> In such cases, the two business entities, although otherwise viewed by the law as separate, are both, in the eyes of the law, considered employers of a particular individual and both entities must be held to the obligations of employers under the Act.

Shared decision-making in matters governing the essential terms and condition of employment is the foundation of the current joint employer test under the NLRA which was articulated in 1982 by the Third Circuit in *N.L.R.B. v. Browning-Ferris Indus. of Pennsylvania, Inc.*<sup>9</sup> Shortly after, in 1984, the NLRB adopted the Third Circuit’s joint employer test.<sup>10</sup> Yet, the Board expanded on the Third Circuit’s standard by defining essential terms and conditions of employment as those “such as hiring, firing, disciplining, supervision, and direction of employees”<sup>11</sup> and requiring the putative joint employer’s control over these terms and conditions of employment to be direct and immediate.<sup>12</sup> Prior to 1984 the joint employer analysis under the NLRA was “somewhat more amorphous,”<sup>13</sup> with a variety of standards, depending on jurisdiction. Despite the initial variations among the standards, the current joint employer test had remained settled law under the NLRA for thirty years.<sup>14</sup>

In April of 2014, however, the NLRB issued a formal notice that it would accept amicus briefs to address the Board’s longstanding joint employer standard articulated in *TLI, Inc.* and

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<sup>7</sup> *N.L.R.B. v. Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982) citing *C.R. Adams Trucking, Inc.*, 262 N.L.R.B. 563 (1982), *Ref-Chem Co. v. NLRB*, 418 F.2d 127, 129 (5th Cir. 1969), and *NLRB v. Greyhound Corp.*, 368 F.2d 778, 780 (5th Cir. 1966).

<sup>8</sup> *N.L.R.B. v. Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d 1117, 1122 (3d Cir. 1982) quoting. *N.L.R.B. v. Checker Cab Co.*, 367 F.2d 692, 698 (6th Cir. 1966).

<sup>9</sup> *N.L.R.B. v. Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982).

<sup>10</sup> *TLI, Inc.*, 271 N.L.R.B. 798 (1984), *enfd.* 772 D.2d 894 (3d Cir. 1985); *Laerco Transportation*, 269 N.L.R.B. 324, 325 (1984).

<sup>11</sup> *Laerco Transportation*, 269 N.L.R.B. 324, 325 (1984).

<sup>12</sup> *TLI, Inc.*, 271 N.L.R.B. 798, 798-99 (1984); also see *Airborne Express*, 338 N.L.R.B. 597 n.1 (2002) for the Board’s majority noting the requirement direct and immediate control in its joint employer analysis.

<sup>13</sup> *Goodyear Tire & Rubber Co. & Teamsters, Chauffeurs, Warehousemen, Indus. & Allied Workers Helpers Loc. Un. No. 920*, 312 N.L.R.B. 674, 676 (1993).

<sup>14</sup> *Airborne Express*, 338 N.L.R.B. 597 (2002) (refusing to alter the joint employer standard).

*Lacero Transportation*.<sup>15</sup> This indicated the Board's reconsideration of the existing standard. The briefs were to consider whether the Board should adhere to the existing joint employer standard or adopt a new one, and accepted proposals as to what the new standard should be.<sup>16</sup> And despite another longstanding precedent that franchisors are not typically joint employers with their franchisees, several Regional Offices of the National Labor Relations Board<sup>17</sup> have since issued unfair labor practice complaints against McDonald's USA, LLC, one of the world's largest and best known franchisors, as a "joint employer respondent".<sup>18</sup> It is possible that these Regional Offices of the NLRB have changed their joint employer standard in issuing these complaints, yet, it is also possible that the facts and circumstances with respect to this franchisor led the Regional Offices to deem McDonald's USA, LLC a putative joint employer without altering its well-settled joint employer test. Additionally, in February of 2015 the Senate Committee on Health, Education, Labor and Pensions held a full hearing on the issue of the joint

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<sup>15</sup> Notice and Invitation to File Briefs Regarding the Board's Current Joint Employer Standard Under TLI, Inc., 271 N.L.R.B. 798 (1984), *enfd. mem.* 772 F.2d 894 (3d Cir. 1985), and *Laerco Transportation*, 269 N.L.R.B. 324 (1984), National Labor Relations Board (May 12, 2014), *available at* <http://www.nlr.gov/news-outreach/news-story/nlr-invites-briefs-joint-employment-standard>.

<sup>16</sup> *Id.*

<sup>17</sup> Since November 2012 at least 310 unfair labor practice charges were made against McDonald's, USA, LLC filed in Regions 1, 2, 4, 5, 6, 7, 9, 10, 12, 13, 14, 15, 16, 17, 18, 20, 21, 25, 27, 28, and 31. Fact Sheet, McDonald's Fact Sheet, National Labor Relations Board Office of the General Counsel, *available at* <http://www.nlr.gov/news-outreach/fact-sheets/mcdonalds-fact-sheet>. Of those charges, 149 have been closed, 54 are pending investigation as to the merits of the claim, and 107 have been found have merit and approximately 10 of the meritorious cases have been made against corporate-owned McDonald's storefronts. *Id.* The 107 meritorious charges against McDonald's, USA, LLC have been filed in Regions 2, 4, 5, 6, 7, 10, 13, 14, 15, 18, 20, 21, 25, 28, and 31. *Id.* And in December 2014, the NLRB Office of the General Counsel issued a statement that it will consolidate the meritorious charges against McDonald's franchisees and their franchisor, McDonald's, USA, LLC, to take place in a few NLRB Regional Offices throughout the country. Press Release, NLRB Office of the General Counsel Issues Consolidated Complaints Against McDonald's Franchisees and their Franchisor McDonald's, USA, LLC as Joint Employers, National Labor Relations Board, (Dec 19, 2014), *available at* <http://www.nlr.gov/news-outreach/news-story/nlr-office-general-counsel-issues-consolidated-complaints-against>.

<sup>18</sup> See Press Release, NLRB Office of the General Counsel Authorizes Complaints Against McDonald's Franchisees and Determines McDonald's, USA, LLC is a Joint Employer, National Labor Relations Board, (July 29, 2014), *available at* <http://www.nlr.gov/news-outreach/news-story/nlr-office-general-counsel-authorizes-complaints-against-mcdonalds>; see Press Release, NLRB Office of the General Counsel Issues Consolidated Complaints Against McDonald's Franchisees and their Franchisor McDonald's, USA, LLC as Joint Employers, National Labor Relations Board, (Dec 19, 2014), *available at* <http://www.nlr.gov/news-outreach/news-story/nlr-office-general-counsel-issues-consolidated-complaints-against>.

employer standard under the NLRA, and specifically mentioned the issues of this standard the context of franchises.<sup>19</sup>

This comment will articulate the history of the joint employer doctrine in the context of franchises and will investigate the potential reasoning behind the recent (potential) change of position that several of the Regional Offices have made regarding the joint employer status of franchisors. And lastly, it will suggest a new franchise-specific joint employer standard that requires a franchisor's direct and actual control over the instrumentality of the employee's alleged harm. Part II of this comment will provide the general overview of the joint employer doctrine under the National Labor Relations Act. Part III will explain the commercial nature of franchises noting its unique intersection of franchisors' control over their franchisees and franchisees' independence. Part IV discusses the consequences of maintaining the same joint employer standard and of adopting the former joint employer standard; and will then propose a new joint employer standard unique to franchises.

## Part II: Joint Employer Doctrine Under the NLRA

### 1. The Current Joint Employer Standard Under the NLRA

The Supreme Court articulated that the joint employer determination must be a factual inquiry to determine whether the putative joint employer displayed a "sufficient indicia of control"<sup>20</sup> over the employee.<sup>21</sup> Following this precedent, prior to 1984, the courts and Board

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<sup>19</sup> *Who's the Boss? The "Joint Employer" Standard and Business Ownership: Hearing Before the Full Sen. Comm. on Health, Education, Labor and Pensions*, 114th Cong. (2015) (where leaders of the Committee and witnesses, including a law professor, a lawyer, and franchise owners, evaluated and pontificated on the consequences of maintaining or changing the current joint employer standard); see Catherine Ruckelshaus & Mike Munoz, *Who's the Boss? Why Republicans Are Missing the Point on Joint Employer*, Huffington Post (Feb. 6, 2015, 5:36 PM), [http://www.huffingtonpost.com/catherine-ruckelshaus/joint-employment\\_b\\_6633602.html](http://www.huffingtonpost.com/catherine-ruckelshaus/joint-employment_b_6633602.html) (for a critique on the Republican committee members calling for the Board to maintain the current joint employer standard).

<sup>20</sup> *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964).

<sup>21</sup> See *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964) (remanding to the Fifth Circuit Court of Appeals for further proceedings to assess the factual circumstances regarding the level of control of Greyhound, a company that operates bus terminals, and Floors, Inc. a corporation that provides cleaning and maintenance services to

implemented several varying tests to determine the sufficiency of control that would properly warrant a joint employer determination under the NLRA.<sup>22</sup> The varying tests, however, each weighed the importance of certain factors differently or exclusively analyzed certain factors in its inquiry. The Second Circuit looked to a putative joint employer's immediate control over employees with respect to hiring, firing, discipline, pay, insurance, records, supervision and participation in the collective bargaining process.<sup>23</sup> The Third and Fifth Circuits looked to "whether the employer shared or codetermined matters governing the employees' essential terms and conditions of employment."<sup>24</sup> The Fourth Circuit analyzed the sufficiency of control over the employee's work.<sup>25</sup> The Eighth Circuit, endorsed a four-factor test of (1) common ownership, (2) common management, (3) interrelation of operations, and (4) centralized control of labor relations.<sup>26</sup> The Ninth Circuit focused on the level of the employer's authority over "authority over employment conditions, which are within the area of mandatory collective bargaining."<sup>27</sup> And the D.C. Circuit looked to "the amount of actual and potential control"<sup>28</sup> the putative joint employer has over the employees. The putative joint employer's control could be

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Greyhound, exercise over porters, janitors, and maids, to determine whether a bargaining unit consisting of such employees under the alleged joint employer relationship is appropriate).

<sup>22</sup> *Clinton's Ditch Co-op Co. v. N.L.R.B.*, 778 F.2d 132, 137–38 (2d Cir. 1985) (comparing the joint employer standards under the NLRA among the Second, Third, Fourth, Fifth, Eighth, Ninth, and D.C. Circuits).

<sup>23</sup> *Clinton's Ditch Co-op Co. v. N.L.R.B.*, 778 F.2d 132, 137-40 (2d Cir. 1985) citing *International House v. NLRB*, 676 F.2d 906, 912 (2d Cir.1982) for its standard.

<sup>24</sup> *Clinton's Ditch Co-op Co. v. N.L.R.B.*, 778 F.2d 132, 137 (2d Cir. 1985) citing *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1123 (3d Cir.1982); *Ref-Chem Company v. NLRB*, 418 F.2d 127, 129 (5th Cir.1969).

<sup>25</sup> *Clinton's Ditch Co-op Co. v. N.L.R.B.*, 778 F.2d 132, 137 (2d Cir. 1985) citing *NLRB v. Jewell Smokeless Coal Corp.*, 435 F.2d 1270, 1271 (4th Cir. 1970).

<sup>26</sup> *Clinton's Ditch Co-op Co. v. N.L.R.B.*, 778 F.2d 132, 137 (2d Cir. 1985) citing *Pulitzer Publishing Co. v. NLRB*, 618 F.2d 1275, 1279 (8th Cir.), cert. denied, 449 U.S. 875 [101 S.Ct. 217, 66 L.Ed.2d 96]

<sup>27</sup> *Clinton's Ditch Co-op Co. v. N.L.R.B.*, 778 F.2d 132, 137 (2d Cir. 1985) citing *Sun Maid Growers v. NLRB*, 618 F.2d 56, 59 (9th Cir.1980); mandatory subjects of bargaining expressly includes "wages, hours, and other conditions of employment[.]" 29 U.S.C.A. § 158 (West 2015).

<sup>28</sup> *Clinton's Ditch Co-op Co. v. N.L.R.B.*, 778 F.2d 132, 137 (2d Cir. 1985) citing *International Chemical Workers Union Local 483 v. NLRB*, 561 F.2d 253, 255 (D.C. Cir.1977).

direct, in that it directly and jointly controlled labor relations, or indirect, in that it sufficiently controlled the other employer in its decisions regarding its labor relations.<sup>29</sup>

Since the NLRB articulated the current joint employment test under the NLRA in 1984 in *TLI, Inc.* and *Lacero Transportation* the standard for joint employment has continued to be that a putative entity is a joint employer if it jointly shares or co-determines matters governing the essential terms and conditions of employment,<sup>30</sup> such as hiring, firing, disciplining, supervision, and direction of employees.<sup>31</sup> And the Board has stated that the control over these matters must be direct and immediate.<sup>32</sup> It is likely that the 1984 standard narrowed the scope of joint employment, by requiring direct and immediate control, meaning that entities could exercise indirect control over the employment relations of another entity without being named a joint employer.

A substantive and large body of law has formed under the NLRB's 30-year-old current joint employer standard, especially with respect to franchises, contractors, and employment services agencies, because the traditional notions of the employer-employee relationship are blurred in these contexts.<sup>33</sup> This body of law focuses on the levels of control that warrant joint employer status.

The Board determined that the joint employment concept is independent of the single employer or integrated enterprise doctrine;<sup>34</sup> therefore, the finding of joint employer status is not

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<sup>29</sup> See Floyd Epperson, 202 N.L.R.B. 23, 24–28 (1973), enforced mem., 491 F.2d 1390 (6th Cir. 1974) for examples of indirect and direct control.

<sup>30</sup> *TLI, Inc.*, 271 N.L.R.B. 798, 802–03 (1984) citing *N.L.R.B. v. Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d 1117 (3d Cir. 1982).

<sup>31</sup> *Laerco Transportation*, 269 N.L.R.B. 324, 325 (1984).

<sup>32</sup> See *Laerco Transportation*, 269 N.L.R.B. 324 (1984); see *TLI, Inc.*, 271 N.L.R.B. 798, 798–99 (1984); also see *Airborne Express*, 338 N.L.R.B. 597 n.1 (2002) for the Board's majority noting the requirement direct and immediate control in its joint employer analysis.

<sup>33</sup> *Airborne Express*, 338 N.L.R.B. 597 (2002) (Member Liebman, concurring).

<sup>34</sup> The single employer doctrine is a legal concept that treats two separate business entities as one when both entities are sufficiently integrated. *Radio & Television Broad. Technicians Local Union 1264 v. Broad. Serv. of Mobile*,

contingent upon the two (or more) employers being heavily integrated so that the entity can be viewed as one single integrated entity and therefore one single employer.<sup>35</sup>

With respect to employment agencies, the joint employer determination is a fact-sensitive inquiry regarding a sufficiency of control. Joint employment status was affirmed by the Sixth Circuit when an employment agency leased drivers to handle the transportation needs of a manufacturing company when the manufacturer had substantial day-to-day control over the drivers' working conditions, wages, benefits, hiring and firing.<sup>36</sup> The NLRB, however, found that an employee was solely employed by an employment agency, and denied joint employment status, when the agency referred and placed an employee in a milk processing plant for employment when the processing company instructed the employee of when and where to take his breaks, disciplined the employee about his excessive break times and terminated the employee but maintained a timecard for the agency's use.<sup>37</sup>

With respect to employment agencies,<sup>38</sup> the NLRB found that two entities were no longer joint employers when they started to disentangle by one employer's ceasing control over the daily operations of the employees, stopping twice-daily joint supervisory meetings, and requiring each entity to have its own telephone and automobiles to transfer employees.<sup>39</sup> The NLRB also established in the same case, that an entity is not liable for unlawful conduct that occurs before or

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Inc., 380 U.S. 255, 256 (1965). This analysis often evaluates "interrelation of operations, common management, centralized control of labor relations and common ownership" between the two independent businesses. *Id.*

<sup>35</sup> Martiki Coal Corp., 315 N.L.R.B. 476, 477 (1994); *see* N.L.R.B. v. Browning-Ferris Indus. of Pennsylvania, Inc., 691 F.2d 1117 (3d Cir. 1982) for an analysis of the distinctions between the single employer and joint employer doctrines.

<sup>36</sup> Carrier Corp. v. N.L.R.B., 768 F.2d 778, 781–82 (6th Cir. 1985).

<sup>37</sup> Flav-O-Rich, Inc., 309 N.L.R.B. 262, 264–65 (1992).

<sup>38</sup> An employment agency is any entity that is in the business of finding employment and brokers labor for a fee. *Garson v. Div. of Labor Enforcement, Dep't of Indus. Relations*, 33 Cal. 2d 861, 863, 206 P.2d 368, 369 (1949); *Florida Indus. Commission v. Manpower, Inc. of Miami*, 91 So. 2d 197 (Fla. 1956).

<sup>39</sup> Martiki Coal Corp., 315 N.L.R.B. 476, 477–78 (1994).



after an entity is a joint employer; and therefore is liable only for conduct that occurs while the two entities retain joint employer status.<sup>40</sup>

There is a significant amount of law regarding joint employment under the NLRA for contracting and subcontracting work.<sup>41</sup> Under the rules of agency, an individual or entity hiring an independent contractor does not necessarily exercise enough control to deem the independent contractor an agent of the individual or entity.<sup>42</sup> As such, the latter is not usually vicariously liable for the conduct of the independent contractor.<sup>43</sup> As might be expected, however, labeling a company as an independent contractor in the context of the NLRA requires a more detailed analysis.<sup>44</sup> The NLRB will conduct an inquiry into the indicia of control, as it would with any alleged joint employers, to determine whether or not the two entities are, in fact, joint employers.<sup>45</sup>

A business that contracts work to another entity is a joint employer with the contractor when the business “jointly shares or co-determines matters governing the essential terms and conditions of employment.”<sup>46</sup> The Fifth Circuit affirmed the NLRB’s finding that a contractor of janitorial services, and the company utilizing those services, are joint employers when: (1) the

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<sup>40</sup> *Id.*

<sup>41</sup> See generally *Cabot Corp.*, 223 N.L.R.B. 1388 (1976); *Thums Long Beach Co.* 295 N.L.R.B. 101 (1989); *Solid Waste Services, Inc.* 313 N.L.R.B. 385 (1993).

<sup>42</sup> An independent contractor may or may not be an agent of the hiring entity or person and “contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent.” Restatement (Second) of Agency § 2 (1958).

<sup>43</sup> See *Vagle v. Pickands Mather & Co.*, 611 F.2d 1212 (8th Cir. 1979) (noting the potential forms of liability for companies that hire independent contractors); *Ackerman v. Gulf Oil Corp.*, 555 F. Supp. 93, 94 (D.N.D. 1982) (denying defendant’s motion to dismiss because the record indicated a genuine issue of material fact regarding the level of control defendant had over a contractor’s employee).

<sup>44</sup> An analysis regarding the vicarious liability of an entity that hires an independent contractor is a fact intensive inquiry regarding the level of control and typically no single factor or controlling, including the labeling of an entity as an independent contractor is not dispositive. *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1037 (9th Cir. 2014); *Interstate Fire & Cas. Co. v. Washington Hosp. Ctr. Corp.*, 758 F.3d 378, 381 (D.C. Cir. 2014).

<sup>45</sup> *Boire v. Greyhound Corp.*, 376 U.S. 473, 475 (1964).

<sup>46</sup> *TLI, Inc.*, 271 NLRB 798, 798–99 (1984) citing *N.L.R.B. v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982).

company influences the contractor's hiring and firing decisions,<sup>47</sup> (2) the company has control over the contractor's employment policies and; (3) the contractor's employees seek to unionize, the company participates in the collective bargaining process and hires (and exclusively pays for) a labor relations consultant.<sup>48</sup> In contrast, a different janitorial services contractor is not a joint employer with a property management firm when the management firm merely retains the right to review performance of the janitors and checks the janitor's work each day, while the contractor provides its own supervisor who assigns tasks to the janitors each day.<sup>49</sup>

Franchises, like contractors and employment agencies, also fall into a category in which the traditional, single-employer notion is blurred<sup>50</sup> and joint employment status is possible. The aforementioned cases demonstrate that finding joint employment with respect to employment agencies and contractors varies depending on the factual circumstances. The NLRB's joint employer inquiry in the context of franchises has been somewhat consistent,<sup>51</sup> i.e., franchisors and their franchisees are not joint employers. Even prior to 1984, when indirect control was sufficient for joint employment, courts and the Board determined that franchisors are not joint employers because franchisors are given more flexibility in their control for the sake of protecting their brand and its uniformity.<sup>52</sup> For example, when a franchisor enters into a franchise agreement in which franchisees agree to maintain certain standards of the company

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<sup>47</sup> *Texas World Service Co. v. N.L.R.B.*, 928 F.2d 1426, 1433 (5th Cir. 1991).

<sup>48</sup> *Id.*

<sup>49</sup> *Serv. Employees Union*, 312 N.L.R.B. 715, 736 (1993).

<sup>50</sup> *Airborne Express*, 338 N.L.R.B. 597 (2002) (Member Liebman, concurring).

<sup>51</sup> Richard Griffin Jr., General Counsel, National Labor Relations Board, Keynote Speech at the West Virginia University College of Law Labor Law Conference 2014: Zealous Advocacy for Social Change (October 24, 2014), available at <http://wvulaw.mediasite.com/Mediasite/Play/31e143f0990647558b0268e9086ca3e41d?catalog=7e011120-398b-494f-8ce8-9e0aa870d371>.

<sup>52</sup> *Id.*; *Love's Barbeque Rest.* 245 N.L.R.B. 78, 120 (1978); *Tilden, S. G., Inc.*, 172 N.L.R.B. 752, 753 (1968); *Speedee 7-Eleven*, 170 N.L.R.B. 1332, 1333 (1968); *Yellow Cab Co.*, 208 N.L.R.B. 1020, 1021 (1974); see Robert W. Emerson, *Franchising and the Collective Rights of Franchisees*, 42 VAND. L. REV. 1503, 1528 (1990).

with respect to housekeeping and pricing, and the franchisor does not exercise “direct control over the labor relations” of the franchisees, there is no joint employment<sup>53</sup> And again, the NLRB ruled that a franchisor and franchisee were not joint employers when the franchisor paid the employees and provided recommendations for employment relations but did not have the right to exercise control over such relations.<sup>54</sup> These two cases, both decided by the NLRB in 1968, became the most precedential cases with respect to joint employment among franchisees and franchisors.<sup>55</sup>

In short, once the current and narrower standard was promulgated, which requires direct control by the putative joint employer, franchisors have not been found to be joint employers because their control is derived from their relationship with the franchisee exclusively and not directly with the employees.<sup>56</sup> The NLRB’s recent issuance of several unfair labor practice complaints against a franchisor, McDonald’s USA LLC, however, demonstrated the possibility of turning this well-settled notion on its head.<sup>57</sup>

## 2. Consequences of Joint Employer Status Under the NLRA

Joint employers are held to the same statutory obligations as single employers.<sup>58</sup> Under the NLRA, the obligations of employers are plentiful. An employer falling under the jurisdiction of the Act may not interfere with, restrain or coerce employees in the exercise of the right to, and

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<sup>53</sup> *Tilden, S. G., Inc.*, 172 N.L.R.B. 752, 753 (1968).

<sup>54</sup> *Speedee 7-Eleven*, 170 N.L.R.B. 1332, 1333 (1968).

<sup>55</sup> *Tilden*, 172 N.L.R.B. at 753; *Speedee*, 170 N.L.R.B. at 1333.

<sup>56</sup> This finding is not exclusive to franchises. See *Cynatron Enters.*, 216 N.L.R.B. 1110, 1120 (1975) (holding that two entities were not joint employers when one company had no direct control, but only indirect control, by virtue of a contract).

<sup>57</sup> Press Release, NLRB Office of the General Counsel, NLRB Office of the General Counsel Issues Consolidated Complaints Against McDonald's Franchisees and their Franchisor McDonald's, USA, LLC as Joint Employers (Dec 19, 2014), available at <http://www.nlr.gov/news-outreach/news-story/nlr-office-general-counsel-issues-consolidated-complaints-against>.

<sup>58</sup> Additionally, as joint employers, each entity “is responsible for the conduct of the other and whatever unlawful practices are engaged in by the one must be deemed to have been committed by both.” *Hillside Manor Health Related Facility*, 257 NLRB 981, 985 (1981) (citing *Ref-Chem Co.*, 169 N.L.R.B. 376, 380 (1968)).

the right to refrain from, self-organization, bargaining collectively and engaging in concerted activities for the purpose of collective bargaining or other mutual aid or protection.<sup>59</sup> Employers are also required to bargain in good faith regarding certain subjects of employment.<sup>60</sup> Finally, covered employers may not exert domination over the labor organizations formed by the employees<sup>61</sup> and may not discriminate among union and nonunion workers, materials or information.<sup>62</sup>

The jurisdiction of the NLRA for employers is typically contingent upon on two elements—the industry of the employer<sup>63</sup> and its affect on interstate commerce, in quantitative monetary terms.<sup>64</sup> “[I]t is well established that the commerce data of joint or single employers may appropriately be combined for jurisdictional purposes.”<sup>65</sup> Accordingly, there are instances in which an employer is not within the NLRA when independent but, when said employer becomes a joint employer with another entity, the two employers, together, meet the jurisdictional requirement of affecting commerce under the NLRA.<sup>66</sup> Therefore, the employees of the joint employers that now meet the jurisdictional requirements of the Act are awarded the rights to self-organize, unionize, collectively bargain, and engage in concerted activities for

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<sup>59</sup> 29 U.S.C.A. § 157 (West 2015) (granting employees rights); 29 U.S.C.A. § 158 (West 2015) (making it an unfair labor practice to violate § 157 rights).

<sup>60</sup> 29 U.S.C.A. § 158 (West 2015); these subjects are called the mandatory subjects of bargaining and include “wages, hours, and other terms and conditions of employment” and require that the parties exercise good faith with respect to these aforementioned subjects. 29 U.S.C.A. § 158(d) (West 2015).

<sup>61</sup> 29 U.S.C.A. § 158 (West 2015).

<sup>62</sup> 29 U.S.C.A. § 158 (West 2015).

<sup>63</sup> 29 U.S.C.A. § 152(6),(7) (West 2015).

<sup>64</sup> ARCHIBALD COX ET AL., *LABOR LAW CASES AND MATERIALS* 54 (15th ed. 2011).

<sup>65</sup> *Valentine Properties*, 319 N.L.R.B. 8 (1995) citing *73–381 South Broadway Associates*, 304 N.L.R.B. 1108 (1991).

<sup>66</sup> *See Hudson Ridge Owners Corp. & Hudson Ridge Owners Corp.*, 313 NLRB 1055, 1058 (1994) (noting that one of two joint employers independently does not meet the jurisdictional requirement of \$500,000 in gross receipts under the Act but as joint employer with another entity, the two entities, together, meet the \$500,000 threshold and therefore together fall within the jurisdiction of the Act).

mutual aid and protection of the employees, whereas they were not afforded these rights before its employer became a joint employer with another entity.<sup>67</sup>

The power to unionize is likely the most significant right granted to employees under the NLRA. Since the NLRB's recent naming of McDonald's as a joint employer with several of its franchisees, the possibility for unionization has increased.<sup>68</sup>

With respect to collective bargaining, a union that wins a representation election is approximately 40-50% likely to create a contract with an employer; whereas, if a union loses an election, the probability for reaching a collective bargaining agreement is around 10%.<sup>69</sup> In terms of employee earnings, where most of the research of impact of unionization is focused, earlier studies found a large wage disparity between union and nonunion workers in the same position and industry.<sup>70</sup> More recent studies, however, have undercut these findings.<sup>71</sup> As of late, several different studies have concluded that unionization has little affect on average wages.<sup>72</sup> But one author notes that unionization "significantly compresses the distribution of

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<sup>67</sup> Notably, if one of the joint employers does not fall within the definition of employer under the Act, this will not preclude bargaining between the employees and the other joint employer. This is especially important when a company contracts with the government, which is excluded as an employer under the Act. The Board has ruled that in cases as such it will only not consider the government agency and look to whether or not the non-government employer, independently, meets the jurisdictional requirements of the act. *See* Management Training, 317 N.L.R.B. 1355 (1995).

<sup>68</sup> Steven Greenhouse, *McDonald's Ruling Could Open Door for Unions*, N.Y. TIMES (July 29, 2014), [http://www.nytimes.com/2014/07/30/business/nlrh-holds-mcdonalds-not-just-franchisees-liable-for-worker-treatment.html?\\_r=0](http://www.nytimes.com/2014/07/30/business/nlrh-holds-mcdonalds-not-just-franchisees-liable-for-worker-treatment.html?_r=0).

<sup>69</sup> BRIGHAM R. FRANDSEN, WHY UNIONS STILL MATTER: THE EFFECTS OF UNIONIZATION ON THE DISTRIBUTION OF EMPLOYEE EARNINGS 13 (2012), available at <http://economics.mit.edu/files/6950>.

<sup>70</sup> *See* David Card, *The Effect of Unions on the Structure of Wages: A Longitudinal Analysis*, 64 ECONOMETRICA, 957 (1996), available at <http://davidcard.berkeley.edu/papers/union-struct-wage.pdf>.

<sup>71</sup> *See* BRIGHAM R. FRANDSEN, WHY UNIONS STILL MATTER: THE EFFECTS OF UNIONIZATION ON THE DISTRIBUTION OF EMPLOYEE EARNINGS, *supra* note 68 at 14; John DiNardo & David S. Lee, *Economic Impacts of New Unionization on Private Sector Employers: 1984–2001*, 119 (4) THE QUARTERLY JOURNAL OF ECONOMICS 1383, 1389-93 (2004); Richard B. Freeman & Morris M. Kleiner, *The Impact of New Unionization on Wages and Working Conditions*, 8 (1) JOURNAL OF LABOR ECONOMICS S8, S8–S25 (1990).

<sup>72</sup> *See* BRIGHAM R. FRANDSEN, WHY UNIONS STILL MATTER: THE EFFECTS OF UNIONIZATION ON THE DISTRIBUTION OF EMPLOYEE EARNINGS, *supra* note 68 at 14; John DiNardo & David S. Lee, *Economic Impacts of New Unionization on Private Sector Employers: 1984–2001*, 119 (4) THE QUARTERLY JOURNAL OF ECONOMICS 1383, 1389-93 (2004); Richard B. Freeman & Morris M. Kleiner, *The Impact of New Unionization on Wages and Working Conditions*, 8 (1) JOURNAL OF LABOR ECONOMICS S8, S8–S25 (1990).

employee earnings,”<sup>73</sup> meaning that those at the bottom of the wages scale for a particular employer may experience an increase in pay whereas those at the top may see no change at all or a decrease in salary.<sup>74</sup> Another study agrees, finding that, “wage differentials by age, education, and region are typically smaller for unionized workers.”<sup>75</sup> Yet another study indicates that unionization does not seem to affect employment rates but companies that did unionize, experienced slower growth rates than those entities that did not.<sup>76</sup> One analysis concluded, however, that an election that results in favor of unionization decreases the value of the company’s stock by at least \$40,500 per voter, meaning that investors appear hostile to unionization.<sup>77</sup> As one can tell, the jury is still out regarding the exact impacts of organization on wages but the economic analyses.

### Part III: Franchises

Franchising is a method of selling and marketing goods and services that creates a network of independently owned businesses that have the right to sell the products or services of another, usually larger and well-known, business entity.<sup>78</sup> This method of business expansion has experienced dramatic growth in the last half-century and has significant impact on the

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<sup>73</sup> See BRIGHAM R. FRANDSEN, WHY UNIONS STILL MATTER: THE EFFECTS OF UNIONIZATION ON THE DISTRIBUTION OF EMPLOYEE EARNINGS, *supra* note 68 at 14.

<sup>74</sup> *Id.*

<sup>75</sup> See David Card, *The Effect of Unions on the Structure of Wages: A Longitudinal Analysis*, 64 *ECONOMETRICA*, 957, 976 (1996), available at <http://davidcard.berkeley.edu/papers/union-struct-wage.pdf>.

<sup>76</sup> Richard B. Freeman & Morris M. Kleiner, *The Impact of New Unionization on Wages and Working Conditions*, 8 (1) *JOURNAL OF LABOR ECONOMICS* S8, S8–S25 (1990).

<sup>77</sup> David Lee & Alexandre Mas, *Long-Run Impact of Union on Firms: New Evidence From Financial Markets 1961-1991* (National Bureau of Economic Research, Working Paper No. 14709, February 2009); this study suggests that the negative reaction of investors regarding unionization is because it is believed that unionizing leads to less company growth, and fewer economic opportunities for the company. *Id.* at 36.

<sup>78</sup> Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees*, 62 *WASH. & LEE L. REV.* 417, 420 (2005) citing MARTIN MENDELSON, *THE GUIDE TO FRANCHISING* 1 (6th ed. 1999).

nation's economy, especially in the retail industry.<sup>79</sup> In 2007, franchised businesses directly contributed over 9 million jobs and \$468 billion GDP<sup>80</sup> to the U.S. economy.<sup>81</sup>

The International Franchise Association defines a franchise as an “agreement or license between two legally independent parties” which gives:

[1] a person or group of people (franchisee) the right to market a product or service using the trademark or trade name of another business (franchisor); [2] the franchisee the right to market a product or service using the operating methods of the franchisor; [3] the franchisee the obligation to pay the franchisor fees for these rights; [and 4] the franchisor the obligation to provide rights and support to franchisees.”<sup>82</sup>

The relationship between the franchisee and franchisor is created through a contract, typically called a Franchise Agreement.<sup>83</sup> These contracts tend to have several standard terms in which the franchisee: (1) accepts managerial assistance from the franchisors; (2) agrees to run the business in a manner delineated by the franchisor; (3) pays royalties, usually in a percentage of sales to the franchisor; and (4) agrees to a termination clause usual at the will of the franchisor.<sup>84</sup>

The franchise model has the overarching structure of licensing an independent business owner to sell certain products or services and has two most popular formats—product

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<sup>79</sup> Michael R. Flynn, *The Law of Franchisor Vicarious Liability: A Critique*, 1993 COLUM. BUS. L. REV. 89, 89 (1993).

<sup>80</sup> GDP is an acronym for Gross Domestic Product and Gross domestic product “is an aggregate measure of production equal to the sum of the gross values added of all resident institutional units engaged in production (plus any taxes, and minus any subsidies, on products not included in the value of their outputs). The sum of the final uses of goods and services (all uses except intermediate consumption) measured in purchasers' prices, less the value of imports of goods and services, or the sum of primary incomes distributed by resident producer units.” ORGANISATION FOR CO-ECONOMIC AND DEVELOPMENT, GLOSSARY OF STATISTICAL TERMS, *available at* <http://stats.oecd.org/glossary/detail.asp?ID=1163>.

<sup>81</sup> INTERNATIONAL FRANCHISE ASSOCIATION, ECONOMIC IMPACT OF FRANCHISED BUSINESSES I-14 (Vol. 3, Results for 2007), *available at* <http://www.buildingopportunity.com/download/National%20Views.pdf>.

<sup>82</sup> INTERNATIONAL FRANCHISE ASSOCIATION, WHAT IS A FRANCHISE?, <http://www.franchise.org/franchiseesecondary.aspx?id=52625> (last visited Feb. 18, 2015).

<sup>83</sup> See *Mac's Shell Serv., Inc. v. Shell Oil Products Co. LLC*, 559 U.S. 175 (2010), *Han v. Mobil Oil Corp.*, 73 F.3d 872 (9th Cir. 1995), *Shukla v. BP Exploration & Oil, Inc.*, 115 F.3d 849 (11th Cir. 1997) for potential issues with franchise agreements.

<sup>84</sup> Paul H. Rubin, *The Theory of the Firm and the Structure of the Franchise Contract*, 21 J.L. & ECON. 223, 224 (1978).

franchising and business format franchising.<sup>85</sup> The structure of the relationship between the franchisor and franchisee, however, varies greatly, depending on the terms and conditions of the agreement.<sup>86</sup>

There are advantages and disadvantages of franchising. The franchisor typically bears the national advertising costs and the burden of the mechanisms and infrastructure to ensure quality and management standards.<sup>87</sup> The franchisor is able to expand its business more quickly than it would without a franchise arrangement because the initial capital to establish an outlet is obtained by the franchisee, allowing the franchisor to receive royalty payments for a fraction of the effort and costs required to run an entire store.<sup>88</sup> Franchisees make smaller profit margins because of royalty payments made to the franchisor and are confined to the limitations and control set out by the franchisor.<sup>89</sup> Yet, franchisees run their business on a brand that already has, hopefully, legitimacy, good will, and integrity; an existing brand reduces amount of risk for a franchisee.<sup>90</sup> And often the franchisor requires and provides a predetermined infrastructure, while franchisees still get the opportunity to manage their own stores.<sup>91</sup> Franchises also benefit

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<sup>85</sup> Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees*, 62 Wash. & Lee L. Rev. 417, 422 (2005); see *Who's the Boss? The "Joint Employer" Standard and Business Ownership: Hearing Before the Full Sen. Comm. on Health, Education, Labor and Pensions*, 114th Cong. (2015) (for Gerald F. Moore, a witness for the hearing and franchise owner, for an example of the provisions of franchise agreements).

<sup>86</sup> Paul H. Rubin, *The Theory of the Firm and the Structure of the Franchise Contract*, 21 J.L. & ECON. 223, 224 (1978); see James A. Brickley, *Incentive Conflicts and Contractual Restraints: Evidence from Franchising*, 42 J.L. & ECON. 745 (1999) (demonstrating possible conflicts and issues that stem from the contractual relationship between franchisors and franchisees).

<sup>87</sup> Stephanie Sullivant, *Restoring the Uniformity: An Examination of Possible Systems to Classify Franchisees for Workers' Compensation Purposes*, 81 UMKC L. REV. 993, 998 (2013).

<sup>88</sup> Barbara Beshel, INTERNATIONAL FRANCHISE ASSOCIATION EDUCATIONAL FOUNDATION, AN INTRODUCTION TO FRANCHISING (2010), available at [http://www.franchise.org/uploadedFiles/Franchise\\_Industry/Resources/Education\\_Foundation/introtofranchising\\_final.pdf](http://www.franchise.org/uploadedFiles/Franchise_Industry/Resources/Education_Foundation/introtofranchising_final.pdf); Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees*, 62 Wash. & Lee L. Rev. 417, 422 (2005).

<sup>89</sup> Peter Cappelli & Monika Hamori, *Are Franchises Bad Employers?*, 61 INDUS. & LAB. REL. REV. 147 (2008).

<sup>90</sup> John L. Hanks, *Franchisor Liability for the Torts of its Franchisees: The Case for Substituting Liability as a Guarantor for the Current Vicarious Liability*, 24 OKLA. CITY U. L. REV. 1, 28–31 (1999).

<sup>91</sup> Barbara Beshel, INTERNATIONAL FRANCHISE ASSOCIATION EDUCATIONAL FOUNDATION, AN INTRODUCTION TO FRANCHISING (2010), available at



the public. Aside from job opportunities, franchises provide a uniform quality of their product or services, and consumers can expect a standard of quality when entering any of the franchised stores.<sup>92</sup>

The business format franchise is the most popular franchise model, most commonly employed by fast food restaurants and convenience stores.<sup>93</sup> This model licenses a franchisee to use and sell a franchisor's products, services, or trademark and "the complete method to conduct the business itself."<sup>94</sup> Typically the franchisee pays an initial large licensing fee.<sup>95</sup> The franchisee typically agrees to adhere to the quality and control standards of the franchisor, observe the franchisor's uniform format, and pay royalty payments to the franchisor.<sup>96</sup> The franchisor will typically provide training, operation manuals, standards, and advertising.<sup>97</sup>

In contrast, product distribution franchises sell and distribute the franchisor's products. The "franchisor licenses its trademark and logo to the franchisees but typically does not provide them with an entire system for running their business."<sup>98</sup> This format of franchising is most commonly found in the automobile, gasoline and soft drink industries.<sup>99</sup>

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[http://www.franchise.org/uploadedFiles/Franchise\\_Industry/Resources/Education\\_Foundation/introtofranchising\\_final.pdf](http://www.franchise.org/uploadedFiles/Franchise_Industry/Resources/Education_Foundation/introtofranchising_final.pdf).

<sup>92</sup> Heather Carson Perkins, et al., *Franchisor Liability for Acts of the Franchisee*, 29-WTR FRANCHISE L.J. 174 (2010).

<sup>93</sup> David J. Kaufmann, *An Overview of the Business and Law of Franchising* (Managing Legal Issues in Franchising: Leading Lawyers on Helping Clients Master the Ownership Process and Avoid Legal Conflicts), 2013 WL 3773409 (2013).

<sup>94</sup> INT'L FRANCHISE ASS'N, WHAT IS A FRANCHISE?, available at <http://www.franchise.org/franchiseesecondary.aspx?id=52625> (last visited Feb. 18, 2015).

<sup>95</sup> Christian C. Burden & Sean Trende, *The Economic Loss Rule and Franchise Attorneys*, 27 FRANCHISE L.J. 192, 194 (2008) (citation omitted).

<sup>96</sup> Barbara Beshel, *An Introduction to Franchising*, INT'L FRANCHISE ASS'N EDUC. FOUND. (Apr. 17, 2015, 3:39 PM), <http://www.franchise.org/an-introduction-to-franchising>.

<sup>97</sup> Paul H. Rubin, *The Theory of the Firm and the Structure of the Franchise Contract*, 21 J.L. & ECON. 223, 224 (1978).

<sup>98</sup> *What Is a Franchise*, INT'L FRANCHISE ASS'N, <http://www.franchise.org/franchiseesecondary.aspx?id=52625> (last visited Feb. 4, 2015).

<sup>99</sup> *Id.*

Given the structure of franchising, with the unique dichotomy of the franchisee's autonomy and the franchisor's ability to control facets of the franchisee's business, the traditional notions of a single employer, in the franchise context, have become muddled. Nevertheless, the NLRB had somewhat consistently refused to name a franchisor a joint employer with its franchisees in the past but this precedent may change in light of the NLRB's recent complaint naming McDonald's USA LLC, a joint employer with several of its franchisees.<sup>100</sup>

#### Part IV: The Same, the Old, or a New Joint Employer Standard of the NLRA? and Its Effect on Franchises

In light of the NLRB's request for briefs on the joint employer doctrine, there has been speculation that it may depart from its long-standing joint employer standard promulgated in 1984—that a joint employer must exert direct and immediate control in jointly sharing and co-determining matters governing the essential terms and conditions of employment,<sup>101</sup> such as hiring, firing, disciplining, supervision, and direction of employees.<sup>102</sup> Among the briefs, several amici suggest that the Board should maintain its current joint employer status.<sup>103</sup> Others contend that the current standard is too narrow and should be broadened to include levels of control that

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<sup>100</sup> This is not to say that franchisors cannot be joint employers with entities beside their franchisees. *See* *Dunkin' Donuts Mid-Atlantic Distribution Center, Inc. v. N.L.R.B.*, 363 F.3d 437 (2004) (holding that a Dunkin' Donuts distribution center which shipped products to retail stores was a joint employer with a company from which it leased truck drivers and warehouse employees); *see* *Parklane Hoisery Co.*, 203 NLRB 597 (1973) *overruled by* citing *N.L.R.B. v. Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d 1117 (3d Cir. 1982) (holding a franchisor and franchisee as joint employers); *H.A. Green Decorating Co.*, 299 NLRB 157 (1990) (naming a franchisor

<sup>101</sup> *TLI, Inc.*, 271 N.L.R.B. 798 (1984), citing *N.L.R.B. v. Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d 1117 (3d Cir. 1982).

<sup>102</sup> *Laerco Transportation*, 269 N.L.R.B. 324, 325 (1984).

<sup>103</sup> Brief for the General Counsel of the NLRB as Amici Curiae, *Browning-Ferris Indus. of Pennsylvania, Inc.*, 259 N.L.R.B. (1981) *enforced*, 691 F.2d 1117 (3d Cir. 1982) (supporting a return to the prior, broader standard); Brief for Coalition for a Democratic Workplace et al. as Amici Curiae, *Browning-Ferris Indus. of Pennsylvania, Inc.*, 259 N.L.R.B. (1981) *enforced*, 691 F.2d 1117 (3d Cir. 1982) (supporting maintaining the same narrow standard); Brief for Professors of Labor and Employment Law as Amici Curiae, *Browning-Ferris Indus. of Pennsylvania, Inc.*, 259 N.L.R.B. (1981) *enforced*, 691 F.2d 1117 (3d Cir. 1982).

are indirect. These arguments and conflicting opinions regarding the joint employer doctrine are not new to the Board.<sup>104</sup>

1. What would maintaining the same joint employer standard mean for franchises?

If the current joint employer standard is maintained, two results may follow: (1) the standard will continue insulating franchisors from joint employer status and thus NLRA jurisdiction or (2) the facts and circumstances regarding direct control of certain franchisors will lead the Board to deem at least some franchisors joint employers with their franchisees. If the current standard is maintained, most franchisors will continue to avoid joint employer status. The focus of this section will be the latter possibility under the current standard.

Historically, franchisors controlled their franchisees through mandatory guidelines, quality control standards, and policies.<sup>105</sup> In turn, as the franchisees adhered to these obligations set forth by the franchisor, these procedures affected the labor relations between the franchisee and its employees.<sup>106</sup> Hence, the type of control that franchisors have over the employees of their franchisees is indirect, which does not meet the requirements of the current joint employer standard.<sup>107</sup> Because of the chain of control—from the franchisor to the franchisee, then from

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<sup>104</sup> See *Airborne Express*, 338 N.L.R.B. 597 (2002) (Member Liebman, concurring).

<sup>105</sup> Paul H. Rubin, *The Theory of the Firm and the Structure of the Franchise Contract*, *supra* note \_\_\_\_.

<sup>106</sup> One franchise agreement between McDonald's, USA, LLC and a franchisee included a section on manuals, explaining the franchisor will provide detailed manuals to the franchisee regarding "(a) required operations procedures; (b) methods of inventory control; (c) bookkeeping and accounting procedures; (d) business practices and policies; and (e) other management and advertising policies. Franchisee agreed to promptly adopt and use exclusively the formulas, methods, and policies contained in the business manuals." The agreement goes on to mandate the franchisee to require its employees to wear uniforms, present a neat and clean appearance, and render competent and courteous service to customers. Record, *Franchise Agreement at 3, Dorothy Graham v. City of New York*, No. 501937/2013 (N.Y. Sup. Ct. 2013); A New Yorker article purported that McDonald's "exercises, through its standard contract, the most elaborate possible control over virtually every aspect of its franchisees' operations, and the pay and the treatment of workers are very largely determined by that control." William Finnegan, *Dignity: Fast-food workers and a new form of labor activism*, THE NEW YORKER, Sept. 15, 2014, available at <http://www.newyorker.com/magazine/2014/09/15/dignity-4>.

<sup>107</sup> *TLI, Inc.*, 271 N.L.R.B. 798 (1984), *enfd.* 772 D.2d 894 (3d Cir. 1985); *Laerco Transportation*, 269 N.L.R.B. 324, 325 (1984).

the franchisee to its employees—is indirect, the franchisor was not a joint employer with its franchisees under the NLRA.<sup>108</sup>

It appears, however, that in light of technological advancements, some franchisors may have the capacity to control employees in a new and more direct manner.<sup>109</sup> Franchisors with direct and immediate control over labor relations that jointly share or co-determine matters governing the essential terms and conditions of employment will be named joint employers with their franchisees even if the current standard remains.<sup>110</sup> With new computer software programs that contain real-time information on gross sales and minute-by-minute labor costs, some franchisors now have the capacity to signal employees to leave for the day, completing their shift.<sup>111</sup> A recent New Yorker article recounts the details of McDonald’s nationwide scheduling software, which is speculated to have contributed to the Board’s recent complaint naming McDonald’s and several its franchisees joint employers.<sup>112</sup> “The crew scheduling software used by McDonald’s is reputed to be sophisticated, but to the workers it seems mindless and opaque.

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<sup>108</sup> *Speedee 7-Eleven*, 170 N.L.R.B. 1332, 1333 (1968) (holding that a franchisor is not a joint employer with its franchisee of its franchisee’s employees because the franchisor’s control over the employees was not direct).

<sup>109</sup> Richard Griffin Jr., General Counsel, National Labor Relations Board, Keynote Speech at the West Virginia University College of Law Labor Law Conference 2014: Zealous Advocacy for Social Change, *supra* note 50; Brief for the General Counsel of the NLRB as Amici Curiae, *Browning-Ferris Indus. of Pennsylvania, Inc.*, 259 N.L.R.B. (1981) *enforced*, 691 F.2d 1117 (3d Cir. 1982); William Finnegan, *Dignity: Fast-food workers and a new form of labor activism*, THE NEW YORKER, Sept. 15, 2014, available at <http://www.newyorker.com/magazine/2014/09/15/dignity-4>.

<sup>110</sup> However, a conscious franchisor may argue -- successful before 1984 when indirect control was sufficient for joint employment -- that the franchisor should nevertheless not be a joint employer because of the nature of franchises and its interest in protecting its brand.

<sup>111</sup> Richard Griffin Jr., General Counsel, National Labor Relations Board, Keynote Speech at the West Virginia University College of Law Labor Law Conference 2014: Zealous Advocacy for Social Change, *supra* note 50; the General Counsel of the NLRB contends that this level of control is direct and would make franchisors joint employers with their franchisees under the current standard and that even if the old standard is readopted (which still protected franchisors from joint employer status since it was protecting its brand), this direct control exceeds the necessary amount permissible by the old standard to maintain the uniformity of the brand and would deem it a joint employer under both standards, *Id.*; McDonald’s William Finnegan, *Dignity: Fast-food workers and a new form of labor activism*, THE NEW YORKER, Sept. 15, 2014, available at <http://www.newyorker.com/magazine/2014/09/15/dignity-4>.

<sup>112</sup> Richard Griffin Jr., General Counsel, National Labor Relations Board, Keynote Speech at the West Virginia University College of Law Labor Law Conference 2014: Zealous Advocacy for Social Change, *supra* note 50.

The coming week's schedule is posted on Saturday evenings.”<sup>113</sup> One employee noted that the schedules in the McDonald's location that she works are no longer posted and that her manager instead hands her a “thin strip of paper . . . like the stuff that comes out of a shredder” with each individual's schedule.<sup>114</sup>

Technology has changed the nature of employment everywhere. A franchisor may now have the capacity to be more directly involved in labor relations between the franchisee and employees. This means that, if franchisors utilize technology in way that directly and jointly affects the terms and conditions of employment they will be subject to joint employer status.<sup>115</sup> Most franchisors, however, do not use such intrusive technology and, if the current standard remains, the status quo will remain for them as well. Yet, the Board may deem franchisors joint employers with their franchisees if the former demonstrate direct control over the employees of the latter.<sup>116</sup>

2. What would a readopting the former, traditional joint employer standard mean for franchises?

The pre-1984 joint employer standard would mark a return to “amorphous”<sup>117</sup> test that varied depending on jurisdiction.<sup>118</sup> This standard evaluated the totality of the circumstances and was rooted in the notion of a sufficient indication of control<sup>119</sup> but took on many different forms

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<sup>113</sup> William Finnegan, *Dignity: Fast-food workers and a new form of labor activism*, THE NEW YORKER, Sept. 15, 2014, available at <http://www.newyorker.com/magazine/2014/09/15/dignity-4>

<sup>114</sup> *Id.*

<sup>115</sup> Steven Greenhouse, *McDonald's Ruling Could Open Door for Unions*, N.Y. Times, July 30, 2014, at B1, available at [http://www.nytimes.com/2014/07/30/business/nlrb-holds-mcdonalds-not-just-franchisees-liable-for-worker-treatment.html?\\_r=0](http://www.nytimes.com/2014/07/30/business/nlrb-holds-mcdonalds-not-just-franchisees-liable-for-worker-treatment.html?_r=0).

<sup>116</sup> For more arguments for the need to maintain the current standard see *Who's the Boss? The "Joint Employer" Standard and Business Ownership: Hearing Before the Full Sen. Comm. on Health, Education, Labor and Pensions*, 114th Cong. (2015); Brief for Coalition for a Democratic Workplace et al. as Amici Curiae, *Browning-Ferris Indus. of Pennsylvania, Inc.*, 259 N.L.R.B. (1981) *enforced*, 691 F.2d 1117 (3d Cir. 1982)

<sup>117</sup> *Airborne Express*, 338 N.L.R.B. 597 (2002) (Member Liebman, concurring).

<sup>118</sup> *See supra* pp. 4–6.

<sup>119</sup> *Boire v. Greyhound Corp.*, 376 U.S. 473, 480 (1964).

and varieties according to jurisdiction.<sup>120</sup> It did not require direct and immediate control by the putative joint employer<sup>121</sup> and was thus a more inclusive than the current narrower test.<sup>122</sup>

Returning to a broader joint employer standard may have some complicating implications for franchisors.<sup>123</sup> Primarily, various standards, which further “complicate matters by attaching vastly different weight to certain indicia of control,”<sup>124</sup> create inconsistency in jurisdictions throughout the same country under the same statute.<sup>125</sup> The law under the NLRA would benefit from referencing uniform rules and standards in its own case law.<sup>126</sup> The broader standard was discarded for, among other reasons, a lack of clarity and consistency in 1984.<sup>127</sup> Moreover, franchisors are often national companies, having their franchisees located throughout various jurisdictions within the United States, and typically implement company-wide procedures and policies. Franchisors may then need to alter their processes, depending on the jurisdiction, throughout the country to obviate itself from obligations of the NRLA.<sup>128</sup>

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<sup>120</sup> See *supra* pp. 4–6.

<sup>121</sup> See *Airborne Express*, 338 N.L.R.B. 597, 597 n.1 (2002) citing *Floyd Epperson*, 202 N.L.R.B. 23 (1973) *enfd.* 491 F.2d 1390 (6th Cir. 1974); *Jewel Smokeless Coal Corp.*, 170 N.L.R.B. 392, 393 (1968); *Indus. Personnel Corp. v. N.L.R.B.* 657 F.2d 226, 229 (8th Cir. 1981) (demonstrating a putative joint employer’s direct control over labor relations).

<sup>122</sup> See *Airborne Express*, 338 N.L.R.B. 597 (2002) (Member Liebman, concurring).

<sup>123</sup> See *Who’s the Boss? The “Joint Employer” Standard and Business Ownership: Hearing Before the Full Sen. Comm. on Health, Education, Labor and Pensions*, 114th Cong. (2015) (for franchise owner Gerald F. Moore advocating for the current joint employer standard, in fear that a broader standard would remove his autonomy in running and managing his franchised institutions).

<sup>124</sup> Michael R. Flynn, *The Law of Franchisor Vicarious Liability: A Critique*, 1993 COLUM. BUS. L. REV. 89, 92 (1993); also see *Boire v. Greyhound Corp.*, 376 U.S. 473, 480 (1964).

<sup>125</sup> *Clinton’s Ditch Co-op Co. v. N.L.R.B.*, 778 F.2d 132, 137 (2d Cir. 1985) (noting the inconsistency regarding a joint employer standard amongst the Courts of Appeal); see *Who’s the Boss? The “Joint Employer” Standard and Business Ownership: Hearing Before the Full Sen. Comm. on Health, Education, Labor and Pensions*, 114th Cong. (2015) (Senator Patty Murray (D-WA) advocating for a broader joint employer standard which she claims is more equitable and employee-friendly).

<sup>126</sup> Note that the NLRB, as a federal administrative agency, has the right to exercise *nonacquiescence*, in that it need not follow the jurisdiction of the circuit in which it is located. This doctrine, amongst all federal agencies is very controversial; see Rebecca Hanner White, *Time for A New Approach: Why the Judiciary Should Disregard the “Law of the Circuit” When Confronting Nonacquiescence by the National Labor Relations Board*, 69 N.C. L. REV. 639 (1991); also see Samuel Estreicher, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989).

<sup>127</sup> See *Clinton’s Ditch Co-op Co. v. N.L.R.B.*, 778 F.2d 132, 137 (2d Cir. 1985) (taking issue with the various joint employer standards).

<sup>128</sup> The NLRB has broad discretion in choosing a new standard and may refer to old precedent. The nonacquiescence and Chevron doctrine iterate the Board’s considerable deference and discretion.

There should be a uniform standard, but the Board might have the power to pick among the possibilities. In other words, the choice is not between the pre-1984 chaos and the current situation but rather there is the possibility of the Board picking one of the earlier standards. The courts would then have to give the standard *Chevron* deference – of course, before 1984, there was no such deference.

It may be argued, however, that a less rigid standard is more equitable, because it looks to the facts and circumstances of the level of control the putative joint employer has with respect to labor relations, as opposed to direct control in only certain criteria, like hiring and firing.<sup>129</sup> This proposed standard may also be more consistent with the goals of the Act, since it is possible for an entity to indirectly control subjects of bargaining, the collective bargaining process, and terms and conditions of employment.<sup>130</sup> And it has been argued that it is equitable to hold each party that influences these areas of labor relations to the obligations of the NLRA.<sup>131</sup> Franchisors contend that they have no role in bargaining with employees because they do not control employment relations.<sup>132</sup> Franchisees who likely prefer autonomy in their business and employment decisions may prefer the current standard.<sup>133</sup> As franchisors are incentivized to exclude themselves from their franchisees' labor relations (because doing so excludes them from NLRA jurisdiction), franchisees benefit by retaining control over their own employment

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<sup>129</sup> See Brief for the General Counsel of the NLRB as Amici Curiae, *Browning-Ferris Indus. of Pennsylvania, Inc.*, 259 N.L.R.B. (1981) *enforced*, 691 F.2d 1117 (3d Cir. 1982); See *Who's the Boss? The "Joint Employer" Standard and Business Ownership: Hearing Before the Full Sen. Comm. on Health, Education, Labor and Pensions*, *supra* note 125.

<sup>130</sup> *Airborne Express*, 338 N.L.R.B. 597 (2002) (Member Liebman, concurring).

<sup>131</sup> *Id.*; *Who's the Boss? The "Joint Employer" Standard and Business Ownership: Hearing Before the Full Sen. Comm. on Health, Education, Labor and Pensions*, 114th Cong. (2015).

<sup>132</sup> Brief for Coalition for a Democratic Workplace et al. as Amici Curiae, *Browning-Ferris Indus. of Pennsylvania, Inc.*, 259 N.L.R.B. (1981) *enf'd*, 691 F.2d 1117 (3d Cir. 1982).

<sup>133</sup> *Who's the Boss? The "Joint Employer" Standard and Business Ownership: Hearing Before the Full Sen. Comm. on Health, Education, Labor and Pensions*, 114th Cong. (2015).

procedures.<sup>134</sup> Yet, franchisee employees likely prefer a broader standard because it would possibly open up the resources of an entirely new entity, the franchisor, in the case of an injury, for benefits, or increased wages, and rights under the NLRA.<sup>135</sup>

Strikingly, the broader standard may *continue* to insulate many franchisors from joint employer determinations. The former standard permitted a finding of joint employment whether the control of the putative joint employer was direct or indirect, and had a totality-of-the-circumstances approach.<sup>136</sup> Franchisors were permitted to exercise levels of control that would normally result in joint employer status because the courts stated the control was necessary for franchisors to protect the integrity and goodwill of their brand.<sup>137</sup> In fact, franchisors have a duty to protect their trademark under the Lanham Act.<sup>138</sup> The Board and courts, in applying the broader standard, excused franchisors from a joint employer determination for their control because doing so would potentially “penalize franchisors who must exercise a high degree of control to protect their trade or service mark under the Lanham Act.”<sup>139</sup>

If Board adopts the broader test there are two possible implications for franchisors. First, as we have seen previously, the franchisor may be deemed a joint employer for its indirect (or

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<sup>134</sup> *Id.*

<sup>135</sup> One McDonald’s employee claimed that the franchisor, not the franchisee, was the true opponent of her and her colleague’s requests for higher wages. William Finnegan, *Dignity: Fast-food workers and a new form of labor activism*, THE NEW YORKER, Sept. 15, 2014, available at <http://www.newyorker.com/magazine/2014/09/15/dignity-4>.

<sup>136</sup> *Airborne Express*, 338 N.L.R.B. 597 (2002) (rejecting to reevaluate the current joint employer standard and noting the standard’s requirement of direct control).

<sup>137</sup> See *Love’s Barbeque Rest.*, 245 N.L.R.B. 78 (1978) *enfd in rel. part*, 640 F.2d 1094 (9th Cir. 1981); *Tilden, S. G., Inc.*, 172 N.L.R.B. 752, 753 (1968); “a franchisor should be permitted to retain as much control as is necessary to protect and maintain its trademark, trade name, and goodwill without the risk of creating an employer . . . relationship.” Dean T. Fournaris, *The Inadvertent Employer: Legal and Business Risks of Employment Determinations to Franchise Systems*, 27 FRANCHISE L.J. 224, 226 (2008).

<sup>138</sup> 15 U.S.C.S. 1051 et seq. (Westlaw 2015); Michael R. Flynn, *The Law of Franchisor Vicarious Liability: A Critique*, 1993 COLUM. BUS. L. REV. 89, 92 (1993) citing Herbert B. Chermiside, Jr. Annotation, Vicarious Liability of Private Franchisors, 81 A.L.R.3d 764 (1977).

<sup>139</sup> Michael R. Flynn, *The Law of Franchisor Vicarious Liability: A Critique*, 1993 COLUM. BUS. L. REV. 89, 999 (1993) citing Herbert B. Chermiside, Jr. Annotation, Vicarious Liability of Private Franchisors, 81 A.L.R.3d 764 (1977).



direct, but most likely indirect) control over its franchisee. But the Board or the courts may excuse the franchisor from this status, as done in the past, because the control would be justified as maintaining the integrity and brand of its trademark under the Lanham Act.<sup>140</sup> Second, the Board may decide that the inquiry is fact-specific and in evaluating the franchisor's control over its franchisee's labor relations (direct or indirect) and hold, in some extraordinary cases, that the franchisor's control exceeds what is necessary to protect its brand and is therefore a joint employer with its franchisees.<sup>141</sup> If this broader standard is readopted, a franchisor's *indirect* control that exceeds the amount necessary to justify protecting its brand, will warrant the Board to name a franchisor and its franchisee joint employers in an unfair labor practice complaint under the NLRA.

### 3. An Entirely New Standard for Joint Employment With Respect to Franchises

Because of the unique combination of a franchisee's autonomy and the franchisor's ability to control facets of the franchisee's business, the NLRB should create an entirely new joint employer standard exclusively applied to franchisors.<sup>142</sup> As mentioned *supra*,<sup>143</sup> the Board and courts have historically treated franchisors differently from other business entities by excusing them from joint employer status with their franchisees despite a sufficient level of control because the control was needed to protect a trademark.<sup>144</sup>

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<sup>140</sup> 15 U.S.C.A. § 1111 et seq. (West 2015).

<sup>141</sup> Richard Griffin Jr., General Counsel, National Labor Relations Board, Keynote Speech at the West Virginia University College of Law Labor Law Conference 2014: Zealous Advocacy for Social Change, *supra* note 50; Brief for the General Counsel of the NLRB as Amici Curiae, *Browning-Ferris Indus. of Pennsylvania, Inc.*, 259 N.L.R.B. (1981) *enforced*, 691 F.2d 1117 (3d Cir. 1982).

<sup>142</sup> See Jennifer C. Wang, *Interpretation of "Joint Employer" Under the Family and Medical Leave Act-Ninth Circuit Holds an Airline That Contracted with Grounds Crews Is Not A "Joint Employer" of Those Workers Under the FMLA: Moreau v. Air France*, 70 J. AIR L. & COM. 567 (2005) for a critique of the joint employer doctrine under the FMLA; Vano Haroutunian & Avraham Z. Cutler, *The Conflict Between the Circuits in Analyzing Joint Employment Under the FLSA: Why the Supreme Court Should Grant Certiorari in Zheng v. Liberty Apparel*, 12 J. FEDERALIST SOC'Y PRAC. GROUPS 77 (2011) calling for clarity amongst the circuit courts regarding joint employment under the FLSA.

<sup>143</sup> See *supra* pp. 23–24.

<sup>144</sup> *Love's Barbecue Rest. No. 62*, 245 N.L.R.B. 78, 120 (1979); *Tilden, S. G., Inc.*, 172 N.L.R.B. 752, 753 (1968).

Following the precedent set by the Supreme Court, joint employment is a determination of control.<sup>145</sup> The Board should discard its requirement of direct control in its joint employer analysis. The requirement of direct control excludes franchisors from becoming joint employers because of the nature of their business model, which controls franchisees indirectly, but may effectively impose policies upon its franchisees, which affects its employees. The mere fact that franchisors implement their labor relations policies through their franchisee does not justify they escaping joint employer responsibilities if they are able to effectively control terms and conditions of employment.<sup>146</sup>

By relieving franchisors that indirectly control employment policies from joint employer status, the Board permits franchisors “to escape the basic compromise that the NLRA generally imposes . . . the requirement that they bargain collectively” with employees.<sup>147</sup> Requiring direct control therefore may defeat the purposes of the Act<sup>148</sup> because it does not require a franchisor, a party that has considerable influence on the bargaining process, to show up to the bargaining table to bargain in good faith.<sup>149</sup>

Instead, I argue, the Board should examine franchisors’ effective and actual control in the instrumentality that is the subject of the employees’ complaint in its joint employer standard.<sup>150</sup> This new standard has three essential elements: effective control, actual control and the control is of, specifically, the instrumentality of the complaint.

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<sup>145</sup> *Boire v. Greyhound Corp.*, 376 U.S. 473, 475 (1964).

<sup>146</sup> *Who’s the Boss? The “Joint Employer” Standard and Business Ownership: Hearing Before the Full Sen. Comm. on Health, Education, Labor and Pensions*, 114th Cong. (2015)

<sup>147</sup> Michael C. Harper, *Defining the Economics Relationship Appropriate for Collective Bargaining*, 30 BOSTON L. REV., 329, 345 (1998).

<sup>148</sup> *Airborne Express*, 338 N.L.R.B. 597 (2002).

<sup>149</sup> Michael C. Harper, *Defining the Economics Relationship Appropriate for Collective Bargaining*, *supra* note \_\_.

<sup>150</sup> Note that this test is to be applied in the context of litigation.

Effective control removes the direct and indirect distinction that the Board has utilized and follows the intentions of the Supreme Court because it has never opined on the need for direct control to satisfy a joint employer standard.<sup>151</sup> For example, “two former McDonald’s managers recent went public with confessions of systematic wage theft claiming that pressure from both franchisees and the corporation forced them to alter time sheets and compel employees to work off the clock.”<sup>152</sup> Pressure like this from both the franchisor and franchisees, here, was effective in controlling activity under the NLRA whether direct or indirect.

Proponents of the current standard advocating for the requirement a direct level of control in co-determining conditions of employment will claim that discarding the direct requirement and replacing it with an “”effective” requirement will open up the possibility for parties who have no control in the specific area of an allegation or subject to defend itself or negotiate. Those arguing in favor of the broader standard will appreciate the ‘totality of the circumstances’ approach of this element of this proposed new test and agree that the direct/indirect distinction is irrelevant if the face of effective control.

The next element of this proposed standard will evaluate the actual control of the franchisor as a putative joint employer. This element is an inquiry into the franchisors’ actual exercise of control and not its mere ability or right to control and borrows significantly from franchisor vicarious liability for which there is a substantial amount of case law.<sup>153</sup> Analyses of vicarious liability and joint employment under the NLRA are both essentially determinations made regarding a sufficiency of control.

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<sup>151</sup> See *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964).

<sup>152</sup> See William Finnegan, *Dignity: Fast-food workers and a new form of labor activism*, NEW YORKER (Sept. 15, 2014, 5:29 PM), <http://www.newyorker.com/magazine/2014/09/15/dignity-4>.

<sup>153</sup> See *Estate of Miller v. Thrifty Rent-A-Car Sys., Inc.*, 637 F. Supp. 2d 1029, 1042 (M.D. Fla. 2009); *Miller v. D.F. Zee's, Inc.*, 31 F. Supp. 2d 792800 (D. Or. 1998); *Courtland v. GCEP-Surprise, LLC*, No. CV-12-00349-PHX-GMS, 2013 WL 3894981, at \*3 (D. Ariz. July 29, 2013).

Because of the unique nature of franchising, the agreement between the franchisee and franchisor permits the franchisor to have the right to control many elements of the franchisee's business. The agreements, manuals, and guidelines provided by the franchisor can be voluminous and typically are. These documents help secure uniformity and protect its brand. Some of these procedures are guidelines but not requirements. When this is the case, the franchisor has no ability to actually control the guidelines if there are no repercussions for the franchisee for failing to meet them. Similarly, with respect to vicarious liability of franchisors, “[m]ost courts have found that retaining a right to enforce standards or to terminate an agreement for failure to meet standards is not sufficient control . . . courts typically draw distinctions between *recommendations* and *requirements*.”<sup>154</sup> A “recommendation” may turn into a mandatory requirement when the franchisee faces penalties or consequences if not followed. The court must investigate whether a guideline, although not explicitly required, is more similar to a requirement by the franchisor, if it places consequences for failed adherence.

A requirement of actual control would appeal to the proponents of the current joint employer standard because it narrows the scope of required control. It does not look to the entire franchise agreement, the franchisor's capacity to control certain elements, or the franchisor's recommendations. Actual control analyzes the conduct of the franchisor regarding a specific guideline or procedure. For instance, if the franchisor provides a single wages guideline to the franchisee that suggests payment to employees of no more than 5% above than minimum wage, but does not enforce such guideline, then there will not be actual control by the franchisor. If the franchisee does not follow this recommendation and the franchisor continually suggests

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<sup>154</sup> Wendy Hong Wu v. Dunkin' Donuts, Inc., 105 F. Supp. 2d 83, 89 (E.D.N.Y. 2000) *aff'd sub nom.* Wu v. Dunkin' Donuts, Inc., 4 F. App'x 82 (2d Cir. 2001) (emphasis in original).

methods or puts some form of pressure on the franchisee to adhere to this suggestion, then it will be more like a requirement and, therefore, actual control in the subject of wages.

The courts cannot evaluate the franchisee-franchisor relationship through the exchange of documents that allow the franchisor to observe plentiful control. The documentation is to ensure the integrity of its brand. Looking at the actual control through the conduct of the franchisor is narrow in scope because it requires the franchisor to exercise control (and not just retain the right to exercise control) regarding guidelines and not merely to have it in the written documents as a contingency to protect its liability.

Once effective and actual control has been established the court must inquire whether the control concerns the instrumentality of the complaint. Borrowing again from the doctrine of vicarious liability, this proposed standard must insure that the franchisor controlled the exact element that lead to the harm or allegation. In New York, for example, it is well-settled that a “franchisor typically is found to be vicariously liable only in situations where it exercised considerable control over the franchisee and the specific instrumentality at issue in a given case.”<sup>155</sup> For example, a Dunkin Donuts, a franchisor, was not held to be vicariously liable when a cashier at a franchisee’s establishment was raped and attacked by entrants because the franchisor did not require specific security measures of its franchisees.<sup>156</sup> Although the franchisor in that case had made recommendations about security measures the Court held that since these were recommendations and not requirements, security was out of the scope of effective and actual control of the franchisor and therefore it was not vicariously liable.<sup>157</sup> Applying this standard in the context of the NLRA will be a simple extension of this doctrine.

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<sup>155</sup> *Id.* at 88.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

If a franchisor requires that franchisees institute a policy to prohibit collective activity of Section 7 of the NLRA and an aggrieved employee seeks to hold the franchisor responsible for this apparent unfair labor practice. It will be apparent that the instrumentality of the injury is controlled by the franchisor and therefore, if that control is effective and actual, it shall be a joint employer in the action.

#### Part V: Conclusion

Because traditional notions of the American workforce and the employer-employee relationship have blurred in the last half-century, the joint employer doctrine was created. This doctrine enables employees to hold the appropriate party responsible for their grievances under the NLRA. Franchises' unique model with inherent autonomy of the franchisees and control by the franchisors calls for a unique standard that is as malleable as the modern workplace. A joint employer standard for franchises that examines a franchisor's effective and actual control in the instrumentality that is the subject of the employees' complaint would help achieve equity for the aggrieved part, franchisees, and franchisors and provides a solid framework to evaluate the circumstances while also maintaining fluidity to adapt to the modern workplace and business models.